Supreme Court, U. S.
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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1976

No. 77-230

GERALDINE C. MEDINA, Petitioner,

v.

WARREN B. RUDMAN, DAVID HESS, ROBERT E. ALLARD, SYDNEY H. FRINK, and SOTERIOS A. SAGGIOTES, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

THE STATE OF NEW HAMPSHIRE

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JURISDICTION

The Court of Appeals for the First Circuit entered its decision affirming the District Court for the District of New Hampshire, on November 9, 1976. Petitioner's petition for Writ of Certiorari was docketed with this Court on August 10, 1977, more than nine months after the First Circuit's decision, and well outside of the three-month period set forth in 28 U.S.C. §2101 (1975). Under that statute the petition is, manifestly, untimely, and this Court is therefore without jurisdiction to review the decision of the Court of Appeals in this case. See Matton Steamboat Co. v. Murphy, 319 U.S. 412 (1943).

STATEMENT OF THE CASE

Petitioner brought suit against Respondents in the District Court for the District of New Hampshire, claiming a cause of action under 42 U.S.C. §§1982 through 1985 (1970) and under 28 U.S.C. §§2201 and 2281 (1970). Petitioner alleged that Respondents' actions in administering certain provisions of the New Hampshire Greyhound Racing statute, RSA 284:6-a, 12-a, 15-a, 15-b and 16-a (Supp. 1975) (the "Racing Statute") deprived her of rights guaranteed by the First and Fourteenth Amendments.[1/] On motion of the Re-

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1/ Despite Petitioner's claim in paragraph 21 of her Complaint that her cause of action arises under the First Amendment, nowhere else do her pleadings even suggest that her interests in free speech, in the free exercise of religion or in an ability to assemble with others to petition for redress of grievances have been jeopardized.

spondents the District Court dismissed Petitioner's Complaint under Rule 12 (b)(6) of the Federal Rules of Civil Procedure (hereinafter "F.R.C.P.") for failure to state a claim on which relief could be granted. Medina v. Rudman, No. 75-297 (D.N.H. Jan. 9, 1976). On appeal the First Circuit affirmed 545 F.2d 244 (1976). The Circuit Court's decision was dated November 9, 1976.

In her Complaint Petitioner claimed that some time in the early spring of 1975 she learned about the New Hampshire Kennel Club, Inc., (the "Club"), a corporation licensed by the New Hampshire Greyhound Racing Commis-

1/ continued from page 2

Both the District Court and the Court of Appeals ignored Petitioner's reference to the First Amendment and she does not contest that action here.

sion (the "Commission"), to operate a greyhound racetrack in Belmont, New Hampshire. In an Affidavit filed with her Complaint Petitioner states that she decided to respond to the Club's need for funds by making an investment in the Club because she thought the greyhound racing business would be a good investment and would afford her a tax shelter. She alleges that she lent an initial sum of money to the Club and that she agreed to make a further and more substantial loan under an agreement with the principals in the Club to sell her a 50 percent stockholder interest in the Club, provided that she obtained the approval of the Commission for her involvement as an equity owner in the corporation.

An exhibit filed with Petitioner's

pleadings indicated that a limited partnership would be formed in which Petitioner would be a limited partner and in which the general partner would be the Club reorganized with two classes of stock, voting and nonvoting. In addition to her limited partnership interest, the people involved contemplated that Petitioner would hold some 43 percent of the voting stock in the corporation as reorganized and 100 percent of the nonvoting stock.[2/]

[2/] Since it is not clear whether the nonvoting stock would be issued in place of then outstanding voting stock, it is not apparent whether the reorganization so contemplated would have resulted in "the change in ownership, legal or equitable, of fifty percent or more of the voting stock of the corporation," within the meaning of RSA 284:16-a (Supp. 1973), with the result that the license held by the Club would "automatically cease," under that section. As a practical matter, Petitioner was in the position of a license applicant before the New Hampshire Racing Commission.

Both the memorandum of this contemplated partnership arrangement and a letter from the Club's lawyer to Petitioner's lawyer, filed as part of her pleadings, made any contemplated investment arrangement involving stock ownership in the corporation contingent upon approval by the Commission of Petitioner as a stockholder. Under the terms of the contract, no action was contemplated and no obligation was incurred which was not subject to the condition of this approval. Early in August of 1975 Petitioner's former New Hampshire counsel filed on her behalf an application to "participate" in the Club's outstanding greyhound racing license. The application indicated that the Petitioner was at that time the holder of a mortgage from the Club to secure a loan "in the

approximate amount of $700,000.00." The Attorney General performed an investigation of the sort made of applicants for greyhound racing licenses and at its conclusion advised the Commission of its results. Based upon those results, the Commission in September, 1975, declined "to approve Geraldine C. Medina as a financial backer, owner, or participant in any way under the license granted to the New Hampshire Kennel Club." This action by the New Hampshire Greyhound Racing Commission was the gravamen of Petitioner's suit.

ARGUMENT

PETITIONER HAS FAILED TO DEMONSTRATE THAT SHE HAS SUFFERED THE ABRIDGEMENT OF ANY INTEREST PROTECTED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Although the Constitution does not indicate with exactness what interests fall within the terms "liberty" and "property," this Court has, from time to time, determined whether particular interests are encompassed by the concepts. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 570 (1972). This Court has held in cases discussed below that an interest protected by the Due Process Clause must be an interest in one of those natural rights universally recognized as a fundamental aspect of individual freedom, or in a benefit actually vested in the claimant under the authority of state law, or in a

benefit to which he can claim to be entitled as one member of a broad class created by state law, rule or understanding. Petitioner has demonstrated no abridgement of any such interest.

1. Cognizable Interests in Liberty

To plead the abridgement of an example of "liberty" which may not be abridged without due process of law, a plaintiff must plead one of the following:

(a) The abridgement of a natural right, and an abridgement to a substantial degree; or

(b) The termination of some right to unfettered conduct conferred by state law, rule or understanding.

(a) Natural Rights and Their Substantial Abridgement.

In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), this Court stated that the liberty protected under the Fourteenth

Amendment

> . . .denoted not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

See also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). The language and the holdings in these cases indicate that the aspects of liberty subject to protection as fundamental rights are rights to choose the kind of person one will be

and will bring up his children to be. These are the rights without which we would not commonly call men free.

Just as the aspect of liberty must be fundamental to attain cognizance under the Due Process Clause so an abridgement of it must be substantial before a court can find such a deprivation as to entitle a plaintiff to relief. In Board of Regents v. Roth, supra, this Court was confronted with a state law scheme which left to the "unfettered discretion" of the state university the decision whether or not to rehire an untenured teacher. The scheme required only that the teacher be informed about the decision concerning retention or nonretention; no statements of reasons for nonretention were required. But this Court held that although the state declined to rehire a nontenured teacher,

in effect, preventing him from engaging in one of the "common occupations of life," Meyer v. Nebraska, supra, at 399, it had not infringed his personal liberty to a constitutional degree. Roth had only been denied one opportunity to engage in the chosen occupation and was perfectly free to find other such opportunities anywhere else in the state. He could not therefore find solace in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), where the plaintiff, who had been denied admission to the state bar, had been prevented from pursuing the entire range of employment opportunities available in the state in the chosen occupation.

(b) The Termination of a Right to Unfettered Conduct Conferred by State Law, Rule or Understanding.

Clearly the most elemental form of

liberty is freedom from bodily restraint. It is axiomatic that a person may not be deprived of that liberty interest without due process of law. Moreover, once a state has abridged that freedom by imprisonment in criminal cases its return to the prisoner, through eligibility for early release and by actual release on parole is subject to procedural protections. See Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1973).

Liberty in a less literal sense was held to be protected under the Due Process Clause in Wisconsin v. Constantineau, 400 U.S. 433 (1971), where this Court held that an individual had a right to due process prior to implementation of a state scheme that would prevent the sale of intoxicating li-

quors to the individuals. The liberty right to due process accrues because of the state's revocation of a liberty, the right -- extended to the individual as an adult member of the populace at large -- to purchase liquor. See Paul v. Davis, 424 U.S. 693, 708-09 (1976).

These cases establish the proposition that once eligibility for a benefit in the nature of personal liberty has been earned, or once the benefit has been given or recognized under state law or rule, some procedural process is due the beneficiary if the state would withdraw or otherwise curtail the benefit.

2. Cognizable Interests in Property Subject to Procedural Due Process Protection

To plead the abridgement of a property interest subject to procedural due

process protection one must claim an interest in which he or she has more than "an abstract need or desire," more than "a unilateral expectation"; it must be an interest to which he or she has "a legitimate claim of entitlement," an interest "upon which people rely in their daily lives." Board of Regents v. Roth, supra, at 577. The range of interests subject to such protection "is not infinite," and in determining whether an interest falls within the range of protection courts "must look not to the 'weight' but to the nature of the interest at stake." Id. at 570. Protected property interests are "created and . . .defined by existing rules and understandings that stem from. . .[a source independent of the Constitution] such as state law -- rules and under-

standings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577. See also Paul v. Davis, supra, at 710.

A recurring example of a property right in opinions of this Court is the interest of the public employee whose employment carries with it an element of permanence or tenure. In Roth, supra, this Court found that a teacher at a state college had no property right to his employment, and therefore no right to procedural protection upon termination, based on the nature of the contractual arrangement under which he was hired. It was to state law, to the rules of the hiring body and to the terms of the contract of hire that the Court looked to determine what interest was at stake.

In contrast Perry v. Sinderman, 408 U.S. 593 (1972), stands for the proposition that a right to due process exists where a teacher has a justified expectation of some permanence in his employment relationship, even though no tenure is formally recognized. The difference between Perry and Roth was that in Perry rules and understandings promulgated and fostered by state officials provided a basis for the inference that a contractual relationship of a certain derivation could not unilaterally be terminated without some formal procedure; without, that is, some process being due. See also Arnett v. Kennedy, 416 U.S. 134 (1974).

To the same point, Bell v. Burson, 402 U.S. 535 (1971) is authority for the rule that once a state issues drivers'

licenses, the interests in the licenses become vested such that "their continued possession may become essential in the pursuit of a livelihood," id. at 539, and thus they may not be revoked without due process. Similarly this Court has found that there is a property right in the interest of a public school student to remain in school, free of suspension, absent a hearing for due process purposes. Goss v. Lopez, 419 U.S. 565 (1975). The Court has also found a property right in the interest of welfare recipients in continuation of benefits. Goldberg v. Kelly, 397 U.S. 254 (1970).

To summarize these cases, a property interest subject to procedural due process protection is one of the sort people rely upon in their daily lives,

like the interest in security of employment whose terms provide security, the interest in a license to drive one's car, to be taught in a public school and to receive the welfare benefits upon which one's survival has come to depend. The dependencies have come to exist, the interests have become secured, under state laws and the relationships which they authorize; nothing short of laws and practices creating "entitlements" will suffice to bring procedural due process to protect what would otherwise be individual desires, however significant for the individual or worthy of encouragement.

The Fifth Circuit has applied these ground rules in a line of cases dealing with liquor licenses. See South Gwinnett Venture v. Pruitt, 491 F.2d 5

(5th Cir. 1974); Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1963). Although in Hornsby the Fifth Circuit held that a person denied a liquor license was due procedural protections, notwithstanding the state's traditional interest in regulating liquor trade, subsequent cases in that circuit seem to represent a retreat from that holding. See Atlanta Bowling Center, supra, at 714; South Gwinnett Venture, supra, at 7, n. 1. At least one other circuit has rejected the Hornsby result. See Lewis v. City of Grand Rapids, 356 F.2d 267, 286-7 (6th Cir. 1966).

Although Hornsby may have som vitality to the extent that, as in Bell v. Burson, supra, it recognizes the signi-

ficance of individual interest in a license where the licensed activity may be a source of livelihood, its great failing may be in judging the individual interest in the abstract rather than in the proper social context. As this Court has made abundantly clear, whether a particular individual interest is a property right is related to the weight placed on that interest by society and to society's concern with regulating that interest, as reflected in state laws, rules and understandings.

Thus the individual's interest in an automobile license may be said to be entitled to greater relative weight than the individual's interest in a liquor license, because state regulations with respect to the former are less stringent than with respect to the

latter, because society recognizes that the former is a sine qua non of normal existence whereas the latter may only be granted to a limited number of persons, and because the individual's entitlement to the former is therefore greater. In short, the Fifth Circuit may have failed to adequately analyze whether Mrs. Hornsby had a justified expectation of a liquor license and may have accorded greater weight to her interest in the license than was due.

3. Petitioner Did Not Plead an Interest Recognized as a Liberty or Property Interest Subject to Procedural Due Process Protection

The foregoing sections describe three types of interests, be they called liberty or property interests, subject to procedural due process protection: (a) interests in natural rights when

substantially infringed, (b) interests in continued freedom of conduct granted by the state, and (c) interests secured or the subjects of entitlement under state law. Petitioner's various claims should be assessed from the standpoint of this list since it provides an indication of what interests have been found to be constitutionally cognizable rights.

(a) Petitioner Did Not Plead a Substantial Abridgement of a Natural Right.

While the right to earn a living would seem to fall within the broad listings set out in Meyer v. Nebraska, supra, Petitioner's right to earn a living was never abridged or even threatened by the State of New Hampshire. Petitioner's pleadings show that she earns approxinately $450,000.00 a year in a business unrelated to greyhound

racing. She sought involvement in the greyhound racing business as an investment and because she wished to obtain a tax shelter. There is here no denial of a natural right to earn a living any more than there was in Roth: Roth could teach elsewhere, the Petitioner can invest and seek tax shelters elsewhere and she can obviously earn a living.

Moreover, while a right to contract or to invest in general may well be cognizable under the Constitution, Petitioner seeks not to vindicate a general right, she seeks, rather, to invest in a particular enterprise of a sort unknown in our society except when and under the conditions that states allow it to exist. It is simply error to claim there is a natural right to in-

vest or to do anything else in relation to racing. Contracts by otherwise able people to go to parochial schools and to drive cars can be said to be part of the American birthright; but not contracts whose objects are to make money from racing dogs.

(b) Petitioner Pled no Abridgement of a Liberty Affirmatively Granted by the State.

This category of procedurally protected interests is not arguably relevant to this case. If somehow Petitioner has been granted a special right to engage in dog racing, the State could not withdraw that right without affording procedural due process, based on Bell v. Burson, supra, and on analogy with Wolff v. McDonnell, supra, Morrissey v. Brewer, supra. But the essence

of her claim is that she has been granted nothing. She is in no position to claim the process due someone from whom a right once granted has been withdrawn.

(c) Petitioner Did Not Plead a Loss of an Interest Secured by State Law, or to Which State Law Entitled Her.

Under Paul v. Davis, supra, rights to which an individual is entitled under state law may be said to include all natural rights, as rights which, in the absence of any regulation restricting their exercise, have been "recognized" under state law. Such rights would include the interest in being free to purchase liquor, as in Constantineau, or the interest in being able to seek jobs as one of the general public free from any state-imposed stigma referred to in Roth. But, as we have already stated,

Petitioner has pled no substantial abridgement of such natural rights.

This Court has recognized some paradigm examples of interests secured by state law, interests subject to entitlement so as to carry due process safeguards: interests of teachers given positions of some permanence to keep them; interests of children of appropriate ages and qualifications to continue school; interests of qualified drivers to drive and of poor people to continue to receive welfare benefits. The interest in racing dogs differs from the interests in these examples in two fundamental respects.

First, the interest in racing dogs is socially trivial while the interests in going to school and in having money to buy food and shelter are fundamen-

tally important to life in our society. To be sure, the Petitioner has a desire to effectuate her interests in racing dogs for profit; her pleadings on their face demonstrate "a unilateral expectation" that she obtain what she desires. Board of Regents v. Roth, supra, at 577. But it does not require more to demonstrate that the interest in racing dogs is not one "upon which people rely in their daily lives." Id. The interest of the deterred racetrack owner does not rise to constitutional significance for purposes of procedural due process.

Second, each of the examples given of interests protected were subject to the claim that a state law, or rule with legal significance, acted as a criterion under which the claimant could be said to be entitled to enjoy the inter-

est. The law obligates the government to provide a public education to children who can attend school and have the capacity to learn. The law provides a driver's license to those who can pass tests of competence. The law provides welfare benefits to those with too little income and no capacity to earn it. The claimants to these interests can claim they have met the criteria for eligibility and they ought therefore to have the promised benefits. But the Petitioner claims no such interest. The Racing Statute contains no criteria of eligibility; nor do regulations of the Commission; nor does an analysis of the Commission's conduct. The Racing Statute does not define eligibility. It does not state criteria. It does not entitle anyone to anything at all.

The Petitioner may think that there should be criteria of eligibility for racing licenses; but the Constitution of the United States does not require any, and consequently it does not require that procedural due process be afforded to those who apply for licenses without success. Respondents have taken away nothing which the law had secured to Petitioner, they have refused her nothing to which she is entitled. Their actions give rise to no claim under the Fourteenth Amendment.

CONCLUSION

Petitioner failed to state any claim upon which relief can be granted. The decision of both the District Court and the Court of Appeals were entirely correct and proper. Moreover, the petition for Writ of Certiorari is not timely. The petition should therefore be denied.

Respectfully submitted,

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September 13, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1977, a copy of the foregoing Memorandum for Respondents was mailed, postage prepaid, to Leonard W. Yelsky, Esquire and David A. Snow, Esquire, counsel for Petitioner.

James C. Sargent, Jr.